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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CYNTHIA WILLIAMS, Plaintiff and Appellant, v. DEVISREE SURESH, et al., Defendants and Respondents.	H043268 (Santa Clara County Super. Ct. No. 1-14-CV-260483)

Plaintiff Cynthia Williams appeals from a judgment entered upon a jury verdict in her personal injury action against Devisree and Kumar Suresh. The jury found Devisree Suresh negligent, but its damages award did not cover future surgical treatment for plaintiff's back injury. Plaintiff seeks reversal and a new trial, contending that the trial court improperly struck her medical expert's testimony on her need for lumbar surgery, thus preventing the jury from awarding her damages for that treatment. On this record we find no abuse of discretion in the trial court's ruling and therefore must affirm the judgment.

Background

This action arose from an accident that occurred on May 3, 2013, when defendant Devisree Suresh made a U-turn in her SUV in front of plaintiff's oncoming motorcycle. Plaintiff filed this action for negligence on February 13, 2014.

Devisree Suresh admitted fault; the issue at trial was the extent of plaintiff's injuries. Twenty witnesses testified over the 11-day trial. Joseph Bistrain, M.D., saw

plaintiff at the emergency room for her complaints of left-sided chest pain and difficulty breathing. She did not have any difficulty with her back, nor did she report any pain in her foot, left wrist, or left shoulder. Other than a possible rib fracture, he found nothing significant. However, extensive conflicting testimony was presented at trial regarding the nature and extent of plaintiff's injuries and preexisting health conditions.[1] Plaintiff had already undergone carpal tunnel surgery and neck surgery, after which she took medication for muscle spasms, anxiety, and nerve pain.

The testimony at issue on appeal was given by Ali Shirzadi, a neurosurgeon. Plaintiff had been referred to him by Michael M. Jadali, D.O., a physical medicine and rehabilitation specialist who had been treating her conservatively for more than a year with muscle relaxants and pain medications. Dr. Shirzadi first saw plaintiff in April 2014 for her complaints of back pain and left leg pain and weakness. Dr. Shirzadi determined that the radiating pain and weakness were caused by collapsed disks at L-3 and L-4 with instability and vertebral slippage, or "spondylolisthesis," along with irritation and compression of the affected nerve. He recommended surgery to repair the slipped vertebrae; conservative treatment had not alleviated the pain. He again made that

[1] The jury heard testimony from numerous other practitioners who had treated plaintiff before or after the accident. Eric Walker was a paramedic who examined plaintiff at the accident scene and noted her report of left upper-quadrant pain. Raymond Hsieh, M.D., had been seeing plaintiff since 2004 for pain management, including prescriptions for pain medication. Two other chronic-pain management specialists, also testified: Dr. Jadali and Annu Navani. The jury also heard from physical therapist Erin Larsen Isanhart; Kristine Marie Kidger, a speech language pathologist who used cognitive and linguistic exercises in therapy; orthopedist surgeons Randall Earl Seago, M.D. and Nathaniel Cohen, M.D. ; and neuropsychologist Alfred Scopp, Ph.D. Two other physicians, radiologist neuroradiologist Jerome Barakos and neurologist Paul Singer, testified by videotaped depositions, which were played for the jury. In addition, diagnostic radiologist William Kevin Hoddick, M.D., testified as a defense consultant regarding the imaging studies performed on plaintiff. And neurosurgery professor Lawrence Mendel Shuer, M.D., a consultant for the defense, testified that it was possible, but not probable, that plaintiff suffered a head injury in the accident.

recommendation when he saw plaintiff for a second visit in 2015. This "back fusion" surgery would entail placing a spacer between the two vertebrae to replace the disk, locked in place with screws. The witness also confirmed the existence of a "Pars fracture" at L-3 and L-5; the L-5, however, did not require surgery, as she was not symptomatic in that location.

Dr. Shirzadi was aware that plaintiff had experienced another traffic accident in May of 2014. Having reviewed records of plaintiff's prior medical care, Dr. Shirzadi acknowledged that spondylolisthesis was a degenerative condition of the spine, and in plaintiff, a longstanding one. She had had a diagnosis of chronic back pain at least since 2004, and she had reported falling due to radiating right leg pain, which her treating physician in 2012 could not explain. Dr. Shirzadi did not have any record or recollection of the patient's reporting such falling episodes due to leg pain. He also agreed that the success rate for lumbar surgery fusion for chronic back pain was low, though it improved when certain conditions, such as spondylolisthesis, existed.

After Dr. Shirzadi was excused, the defense moved to strike all of Dr. Shirzadi's testimony related to future medical care, including the surgery, because the witness "was unable to articulate a more[-]probable-than-not opinion as to the relationship between any future medical care and the subject auto accident." Plaintiff's counsel objected, noting that the witness had been "clearly confused" by cross-examination regarding the difference between "probable" and "possible." Counsel argued that in the expert's use of both terms plaintiff met her prima facie burden to show that to a reasonable degree of medical probability the aggravation of her injury was caused by the subject accidents and required surgery. Citing *Travelers Ins. Co. v. Industrial Acc. Com.* (1949) 33 Cal.2d 685 (*Travelers*), counsel asserted that it would be an abuse of discretion to take the issue away from the jury when there is conflicting testimony regarding the probability that an aggravation of an injury exists that requires surgical repair. It was for the jury to determine which portion of the witness's testimony was credible, he argued.

After reviewing the transcript of Dr. Shirzadi's testimony and the *Travelers* case, the trial court declined to allow the issue of damages for future lumbar surgery to go to the jury. The jury eventually reached a verdict for plaintiff, awarding her $9,684, consisting of only past economic ($2,184) and noneconomic ($7,500) loss.[2] Because defendants had made a reasonable settlement offer of $40,000 under Code of Civil Procedure section 998, they were awarded their post-offer costs. After deducting plaintiff's pre-offer costs, the court entered an amended $35,946 judgment for defendants.

Discussion

Plaintiff contends that the trial court "usurped the role of the jury" by striking Dr. Shirzadi's testimony that the accident caused her to need lumbar surgery. The error was prejudicial, she argues, because the jury was allowed to award damages for only *past* loss; had the issue of *future* medical treatment been permitted, she "would likely have recovered damages on that claim as well." We examine this claim in accordance with the standards applicable to rulings on motions to strike expert testimony and those applicable to appellate review of such rulings.

Dr. Shirzadi's qualifications as an expert were not challenged. He was therefore entitled to give his opinion on subjects that were "sufficiently beyond common experience that the opinion of [the] expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).)[3] This standard applies to the issue of causation: "It is undisputed that

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[2] Plaintiff had asked the jury to award her a total of $1,223,024 in damages.

[3] Evidence Code section 801 states, in its entirety, "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is

qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (*Jennings*).

However, "in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances [that] can produce an injury or disease. A possible cause … becomes 'probable' [only] when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]" (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403; accord, *Jennings, supra,* at p. 1118.)

It is the trial court's function to act as "gatekeeper to exclude speculative or irrelevant expert opinion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 (*Sargon*).) On the other hand, the court "must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable

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precluded by law from using such matter as a basis for his opinion." Evidence Code section 802 allows the witness to state the basis for his or her opinion "unless he [or she] is precluded by law from using such reasons or matter as a basis for his opinion." Evidence Code section 803 adds, "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper."

basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion." (*Id.* at p. 772.)

The trial court in this case determined that Dr. Shirzadi's recommendation that plaintiff undergo lumbar surgery was not based on a reasonable medical *probability*, as opposed to a possibility, that the need for the surgery was caused by the accident. The decision to exclude expert opinion from the jury's consideration is a matter within the court's sound discretion, which must be exercised "within the limits the law permits." (*Sargon*, *supra*, 55 Cal.4th at p. 773.) A ruling that exceeds "the confines of the applicable legal principles" or "that is 'so irrational or arbitrary that no reasonable person could agree with it' " constitutes an abuse of discretion. (*Ibid*.)

We find no such abuse on the record before us. When asked whether the recommended surgery was "entirely" the result of the May 2013 accident, Dr. Shirzadi said he believed "that the accident most likely aggravated [the decompression and fusion of the lumbar spine], but it's not the direct cause." He explained his reason for this belief: "She states that she did not have the left leg pain and the weakness before the accident; and after the accident, she started having worsening back pain and, you know, leg pain and the weakness. Just base[d] on that, that's all we can conclude." That was his understanding of the symptoms from his conversation with plaintiff. However, a paramedic report and the emergency records of the hospital following the 2013 accident, which Dr. Shirzadi had reviewed, did not indicate any complaint of back pain or difficulty walking. In none of the hospital records Dr. Shirzadi had examined did he see complaints of lumbar pain or pain radiating from the low back into the legs. Other

records from May 6, 2013, three days after the accident, showed a report from plaintiff to Dr. Cohen, an orthopedic surgeon, of only left rib pain.

Then defense counsel returned to the prior question of the etiology of the low back pain: "Is it your opinion that the patient suffered a new injury to the low back or an aggravation of the low back injury in the May 3, 2013, traffic accident? [¶] A[:] It's possible. That's all— [¶] Q[:] You can't say any more than that, can you, Doctor? [¶] A[:] I can't say more than that."

After a sidebar, defense counsel again asked, "Did you not just share with us that you're unable to conclude whether the patient suffered a new injury in the May 2013 traffic accident? You just can't say. Right? [¶] A[:] I can't say. [¶] Q[:] Did you not just share with us that you can't say one way or the other whether the patient suffered an aggravation of her low back injury in the traffic accident?" This time the witness explained at length why it was "not just a 'yes' or 'no' answer." Counsel then asked the question a different way: "Doctor, is it possible this patient suffered an aggravation of her low back in the accident? [¶] A[:] It's possible. [¶] Q[:] Is it possible she suffered a head injury in the accident? [¶] A[:] It's possible. [¶] Q[:] These things are possible, aren't they? [¶] A[:] Exactly. [¶] Q[:] But you can't say one way or the other; is that correct? [¶] A[:] Exactly. [¶] Q[:] Would you not agree with me that with respect to the single-level lumbar decompression and fusion [surgery] . . . that you discussed with Ms. Williams, if I were to ask you the question: Doctor, is that related to [the] May 2013 traffic accident, wouldn't you agree with me that your answer would be the same, you can't say? [¶] A[:] Yes. I would just say it's possible."

On redirect, Dr. Shirzadi affirmed that there had been no tests before the accident that would have shown back injury; so it was "possible" that she didn't have slipped vertebrae at L-3 and L-4 before the May 2013 accident. She did, however, have this condition after that accident and before the May 2014 accident. Plaintiff's attorney suggested that in making medical assessments, a doctor can "never know for sure

100 percent one way or the other"; he then asked, "To a reasonable degree of medical probability . . . is it your opinion that the motorcycle accident caused an aggravation to Ms. Williams' L-3, L[-]4," and the witness answered "Yes."

Plaintiff's counsel then attempted to draw a distinction between "possible" and "probable" in the following exchange: "Q[:] To a reasonable degree of medical probability, is it your opinion that the motorcycle accident caused an aggravation to Ms. Williams' lower back causing you to recommend back surgery? [¶] A[:] Yes. [¶] Q[:] Now, I guess it's possible that something else could be it [*sic*] the case, correct? [¶] A[:] Yes. [¶] Q[:] But to a reasonable degree of medical probability, you believe that this motorcycle accident[,] combined with the symptoms that she suffered from after the accident, combined with the MRI, the CT scan, the EMG, the review of all the medical records lead you to believe there is an aggravation to her back. [¶] Correct? [¶] A[:] There is possible. Yes. [¶] Q[:] 'Yes' or 'No'? [¶] A[:] I'm sorry. [¶] Q[:] To a reasonable degree— A[:] Yes. [¶] Q[:] —of medical probability— [¶] A[:] Yes; it's possible. Yes. [¶] Q[:] Okay. Listen to my question. [¶] A[:] Uh-huh. [¶] Q[:] Okay. To a reasonable degree of medical probability— [¶] A[:] Uh-huh. [¶] Q[:] — Reviewing the [past medical tests and records], understanding her condition before, and after— [¶] A[:] Uh-huh. [¶] Q[:] —Listening to her discussion of her treatment— [¶] A[:] Uh-huh. [¶] Q[:] —And her appointments with you. To a reasonable degree of medical probability, the motorcycle accident aggravated her lumbar L-3, 4? [¶] A[:] Yes."

Plaintiff's attorney then asked Dr. Shirzadi to confirm that he did not know whether the preexisting degenerative condition of her lumbar back resulted "from a slipped vertebrae [*sic*], correct?" The witness answered, "No. Usually the slipped vertebrae is [*sic*] the end result of it." Counsel then moved on, eliciting further testimony that another neurosurgeon had, after the accident, recommended surgery. Plaintiff had, however, undergone a bone graft involving her right leg related to the falling episodes.

On re-cross, defense counsel sought to pin the witness down regarding the possible/probable query, creating more confusion: "Doctor, is it your testimony today that it's likely, it's probable, it's medically probable that the May 2013 accident caused a back injury or is it your testimony that you can't say one way or the other?… [¶] [A:] It's possible. [¶] Q[:] . . . So I'm sorry, Doctor. The problem is, 15 minutes ago, you just said something different in response to plaintiff's counsel's question . . . In response to his question you said it's probable; now you're saying it's possible. [¶] *Doctor, in your informed medical opinion, which is it*? [¶] A[:] *It is possible. I'll always—when I said that exactly, that's what I meant. Possible. Medical possibility. I assumed basically we were talking about the same thing. It's possible that the accident aggravated the problem.*" (Italics added.)

After a sidebar, the court conducted its own inquiry: "Q[.] All right, Doctor. I hate to belabor a point, but I need to know. *Is it possible or probable, in your medical opinion, that a new back injury occurred because of the accident*? [¶] A[:] *It's possible.* [¶] Q[:] *Not probable*? [¶] A[:] *No. Possible.* [¶] Q[:] Okay. And how about as to aggravation of an existing back pain? [¶] A[:] Uh-huh. [¶] Q[:] Is it possible or probable that it occurred because of the accident? [¶] A[:] I'm sorry. Would you repeat your question. [¶] Q[:] Yeah. So it's basically the same. *I need to know if it's possible or probable that there was an aggravation of Ms. Williams' back injury or back pain, rather, because of the accident.* [¶] A[:] *Possible.* [¶] Possible? [¶] A[:] (Witness nods head.) [¶] Q[:] Okay. And is it possible or probable that the surgery that you recommend is related to the accident? [¶] A[:] That one, I would have to say probable. [¶] Q[:] Why? [¶] A[:] Because I can't explain the pathology. So if I think that the pathology was caused by the accident, then the surgery's going to help it. That is a hard question to answer. But that's my conclusion on that." (Italics added.) The court asked the witness to explain how he saw the difference between possible and probable. He answered, "Possible is basically could be. Probable is most likely was the cause of

it." The court expressed difficulty understanding, "[b]ecause if you say it's only possible that . . . there was a new injury or aggravation of a preexisting injury, so that's only possible . . . how could it be probable that the surgery is necessary because of the accident?" The witness explained that when he had answered the earlier question, "I was saying the surgery would most likely solve the problem." The court asked, "So it's possible . . . that the surgery is due to the accident. But you're talking about the probability is that the surgery will resolve her issues." The doctor responded, "Exactly."

In light of this clarification, plaintiff's attorney attempted to elicit answers to the question about whether "possible" and "probable" were the same thing to the witness. Objections by the defense were sustained; but the court took over the questioning again to resolve any remaining confusion. Asked whether he had been using his medical reasoning and definitions in distinguishing between the two terms, he said no, "there's no medical knowledge in that. It's just what do you mean by possible, what [do you] mean by probable."

It appears to us, as it did to the trial judge, that when asked to be precise, Dr. Shirzadi was able to articulate the distinction between "possible" and "probable" ("Possible is basically could be. Probable is most likely was the cause of it.") With the assistance of the court and the attorneys, he then clarified his view that while it was probable that the recommended surgery would alleviate the symptoms of plaintiff's back "problem," it was only *possible* that the need for surgery was the result of the May 2013 accident, whether as a new injury or an aggravation of a prior condition. These facts distinguish Dr. Shirzadi's testimony from that of the expert in *Travelers*, *supra*, 33 Cal.2d 685, on which plaintiff relies. That case illustrates the important point that an expert's testimony should be considered as a whole. (*Id.* at p. 687.) We have followed that admonition, as did the trial court. Having thoroughly reviewed the entire transcript of Dr. Shirzadi's trial testimony, we conclude that the trial court properly found that "a reasonable medical probability" was not established sufficient to go to the jury; rather,

only a mere possibility of causation was indicated. Because plaintiff was unable to make the required prima facie showing, the court acted within the bounds of its gatekeeping role in excluding the issue of future surgery from the jury's consideration. No abuse of discretion occurred in striking this portion of the witness's testimony.

Disposition

The judgment is affirmed.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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DANNER, J.

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